

N.D.A.G. Letter to Tracy (Feb. 5, 1991)

February 5, 1991

Ms. Helen Tracy
Executive Director
Workers Compensation Bureau
Russell Building
Highway 83 North
4007 State Street
Bismarck, ND 58501-0600

Dear Ms. Tracy:

Thank you for your January 21, 1991, letter requesting an opinion as to whether N.D.D.C. § 65-02-08 and 65-10-03 allow the Workers Compensation Bureau to promulgate administrative rules providing for the payment of attorney fees only when the claimant prevails in all stages of proceedings, including proceedings before the bureau.

Agency rules must be promulgated in accordance with the procedures of the Administrative Agencies Practice Act. N.D.C.C. ch. 28-32. That act provides that the Attorney General may not approve any rule as to legality where the rule exceeds the statutory authority of the agency. N.D.D.C. § 28-32-02(7). In addition an agency may only do what it is specifically authorized to do by law or what is necessarily implied from a specific authorization. American Fed'n of State, Mun. Employees v. Olson, 398 N.W.2d 97 (N.D. 1983).

N.D.D.C. §§ 65-02-08 and 65-10-03 do not contain specific authorization for the bureau to promulgate the contingent fee rules that you described. Neither can this authority be implied to carry out the purpose of the statutes. The provisions of these two statutes are clear and unambiguous.

N.D.D.C. § 65-02-08 authorizes the bureau to establish rules concerning hourly rates for attorney fees and maximum fees for each stage of the proceedings. These attorney fees are for the purpose of compensating claimant's attorneys ". . . for services following constructive denial of a claim or issuance of an administrative order under chapter 28-32 reducing or denying benefits. . . ." N.D.C.C. § 65-02-08 does not set forth any requirements that the claimant must prevail before these attorney fees can be paid. The only basis for the bureau to deny attorney fees under N.D.D.C. § 65-02-08 is upon a finding that the claim is frivolous.

N.D.D.C. § 65-10-03 does require the bureau to pay attorney fees to the claimant's attorney when the claimant prevails. However, N.D.D.C. § 65-10-03 applies to judicial appeals and not to appeals before the bureau. Furthermore, when the bureau appeals to the North Dakota Supreme Court N.D.D.C. § 65-10-03 requires the bureau to pay the

claimant attorney fees incurred in responding to the appeal. This payment of attorney fees is not contingent upon the claimant prevailing in the supreme court.

A review of the legislative history surrounding N.D.D.C. §§ 65-02-08 and 65-10-03 also supports the conclusion that the bureau does not have the authority to promulgate rules providing for payment of attorney fees only when the claimant prevails in all stages of the proceedings.

The 1989 Legislative Assembly enacted Senate Bill 2173 which amended N.D.D.C. §§ 65-02-08 and 65-10-03. As introduced, Senate Bill 2173, in section 1, required the bureau to pay a contingency fee to the claimant's attorney only where the claimant prevailed following constructive denial of a claim or issuance of an administrative order under chapter 28-32. Section 2 of Senate Bill 2173 repealed N.D.D.C. § 65-10-03. In explaining the provisions of Senate Bill 2173, one of the proponents stated: "The most significant change from the current law is that the attorney will be paid, as a general rule, only if the claimant ultimately prevails." Hearing on S. 2173 Before the Senate Comm. on Industry, Business & Labor, 51st N.D. Leg. (January 10, 1989) (Statement of Pat Seaworth). However, both the Senate and the House subsequently amended Senate Bill 2173.

The Senate amendments to Senate Bill 2173 removed the language in Section 1 of the bill which provided a contingency fee to be paid to claimant's attorneys only where the claimant prevailed. S.J. 407, 51st N.D. Leg. (1989). The bill passed the Senate as amended. S.J. 446, 51st N.D. Leg. (1989). The House also amended Senate Bill 2173. The House accepted the Senate amendments with the exception of the portion requiring fee arbitration by the bar association. H.J. 1489, 51st N.D. Leg. (1989). The Senate then refused to concur with the House amendments and a conference committee was appointed. S.J. 1471, 51st N.D. Leg. (1989). The Senate acceded to the House amendments and the bill then passed the Senate. S.J. 1642 51st N.D. Leg. (1989). Senate Bill 2173, as finally enacted, did not contain the provisions which would have authorized the bureau to pay claimant attorney fees on a contingency basis only where the claimant prevailed in all stages of the proceedings. 1989 N.D. Sess. laws ch. 767.

A contingency fee rule such as you contemplate would exceed the statutory authority of the bureau. Thus it could not be approved as legal. Therefore, it is my opinion that N.D.D.C. §§ 65-02-08 and 65-10-03 do not allow the bureau to promulgate rules which provide for payment of attorney fees only when the claimant prevails in all stages of proceedings, including proceedings before the bureau.

Sincerely,

Nicholas J. Spaeth

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